

1 US BEVERAGE, INC.,

2 Plaintiff,

3 v.

4 JOHN BUSTER WALKER, II, and TRIDENT MARKETING,

5 INC.,

6 Defendants.

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8 JOHN BUSTER WALKER, II, and TRIDENT MARKETING,

9 INC.,

10 Counterclaim Defendants,

11 and

12 GRADY DOWLING KITTRELL, THOMAS GOING CLARK,

13 III, and NORMAN "BUDDY" TODD,

14 Third Party Defendants.

15
16 CIVIL ACTION NO.

17 2:06-CV-496-SRW

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20
21 DEPONENT: Grady Dowling Kittrell

22 DATE: September 15, 2006

1 **A. Not without a -- not without a P&L.**
 2 **Q.** Okay. What about in terms of just sale of
 3 slush products. How big a chunk of your
 4 business was the sale of slush products?
 5 **A. It's not going to be the major portion at that**
 6 **point, and that's one of the reasons we were**
 7 **aggressively seeking to get into it.**
 8 **Q.** Okay. Do you have any idea? Can you give us
 9 a rough estimate? 20 percent?
 10 **A. Again, without a P&L and a specific time**
 11 **stamp, I couldn't off the top of my head give**
 12 **you that information.**
 13 **Q.** I assume your business keeps those type
 14 records that we could eventually obtain.
 15 **A. Oh, sure.**
 16 **Q.** What about -- let's talk about after
 17 Mr. Walker came onboard with your company.
 18 How big a component is the sale of slush
 19 products for your business, let's say today?
 20 **A. Oh, it's a large component today.**
 21 **Q.** Could you put a percentage basis or rough
 22 percentage on it today?
 23 **A. I couldn't give you -- again, without looking**

38

1 **at financial information, give you a --**
 2 **anything would just be a stab in the dark.**
 3 **Q.** Okay. There's -- what about proportionality
 4 in terms of comparing your slush business
 5 before Mr. Walker came onboard with you
 6 compared to today. Two times greater? Three
 7 times greater?
 8 **A. Well, again, I guess I get confused with the**
 9 **term "slush." It's still just juice**
 10 **concentrate. It's all juice concentrate to**
 11 **me, so I see it as product business makes up**
 12 **the majority of our business.**
 13 **Q.** Well, in terms of your sales of fruit juice
 14 concentrate, sitting here today, how much of
 15 the sales would you attribute to just the sale
 16 of just product that ends up just being juice,
 17 you know, not slushy machine or --
 18 **A. Yeah. The juice business is the majority of**
 19 **our business. It's always been the focus of**
 20 **our business.**
 21 **Q.** Okay. And, again, I'm trying to ask you to
 22 explain for us the -- the makeup or the
 23 breakdown of that business. And I know

1 your -- I'm talking about slush, and I know
 2 you're saying that you're considering fruit
 3 juice concentrate to be all the same.
 4 **A. Correct.**
 5 **Q.** But in terms of selling juice in a slush
 6 product or a product that's intended to be
 7 sold to the customer in slush form, compared
 8 to a product that's continued to be sold to
 9 the customer in a liquid form, can you break
 10 down for us the breakdown percentages between
 11 the two?
 12 **A. I cannot. And, again, I view them as the**
 13 **juice concentrate being sold. I don't**
 14 **distinguish the difference as the makeup of**
 15 **our business. It's the same product --**
 16 **Q.** Okay.
 17 **A. -- is what I'm saying. I mean, so I don't**
 18 **know how the customer may end up using it.**
 19 **They may dispense it as a liquid sometimes.**
 20 **They may dispense it as a slush sometimes.**
 21 **Sometimes we package the same product in**
 22 **bag-in-a-box to be dispensed through a**
 23 **machine. I don't understand the distinction**

40

1 **you're making. I'm sorry.**
 2 **Q.** So I guess if your company is putting slush
 3 machines into convenience stores, when you're
 4 selling that juice to go into a slush machine,
 5 your accountants don't in some way distinguish
 6 so you can find out how much your sales are
 7 from the slush machine compared to other
 8 sales?
 9 **A. Sure. We can distinguish whether it was a day**
 10 **care, a C-store, a ballpark or any of those**
 11 **things. I cannot -- I cannot accurately**
 12 **depict that today, though, without a P&L in**
 13 **front of me.**
 14 **Q.** Okay.
 15 **A. Because, again, when I look at numbers, I look**
 16 **at it as juice concentrate. Product sales is**
 17 **how I view it versus equipment.**
 18 **Q.** Has US Beverage ever been in the business of
 19 creating promotional materials or POS
 20 materials for customers?
 21 **A. Have we ever been in the business of that? I**
 22 **don't understand the question.**
 23 **Q.** Okay. Has that ever been a, I guess, part of

1 Q. I've just never -- I don't know if I've heard
2 nepotism used in a positive sense. Have you?

3 A. Well, and I can strike nepotism and use
4 another word.

5 Q. Okay. Well, what word would you like to use
6 instead of nepotism?

7 A. I would say that through family ties, she had
8 relocated to follow him when he left Phenix
9 City to go take on as the state manager of
10 Texas. He brought her in under him. That was
11 my understanding of the situation, and I may
12 be misunderstanding.

13 Q. Okay. If you were upset with Mr. Walker
14 moving to Texas, why didn't US Beverage just
15 buy him out in 2002?

16 A. Well, again, we felt that John could have a
17 participation in the company. I mean, our
18 goal was to make the company work.

19 Q. Okay. And let's talk about the calendar year
20 2002. Were you satisfied or dissatisfied with
21 John's participation in the company?

22 A. 2002. I would say that we were dissatisfied
23 in certain regards but kept thinking that John

82

1 was a competent person and could help us build
2 the business and that we desperately wanted
3 him involved with us to build the business.
4 We needed the guy who was in charge of our
5 sales working with us every day to grow the
6 business.

7 Q. What about 2003? Satisfied or dissatisfied
8 with Mr. Walker's participation in the
9 company?

10 A. I would say that we would have to be
11 dissatisfied with his participation and
12 frustrated with his lack of commitment to the
13 company.

14 Q. Okay. Well, let's move to 2004. Same
15 question. Satisfied or dissatisfied with
16 Mr. Walker's participation in the company?

17 A. Still dissatisfied but thinking that
18 throughout these discussions with Mr. Walker,
19 we kept feeling if he would come back and
20 participate as a full-blown operating person
21 in the business, that we would gain tremendous
22 benefit from him being involved with us. Our
23 intention was to engage Mr. Walker into the

1 business to work with us after repeated,
2 repeated conferences with Mr. Walker to get
3 him engaged with us to grow the business and
4 save the business, increase sales.

5 But were we dissatisfied? I
6 would say that we're always never satisfied
7 with where we're trying to get with our
8 company. We have goals we're trying to reach,
9 and sometimes we don't reach them. We were
10 very dissatisfied with Mr. Walker's
11 participation in the company. We felt he was
12 absent.

13 Q. What about taking it to 2005? Same question.
14 Satisfied or dissatisfaction with the
15 participation?

16 A. I think we became very dissatisfied when we
17 became aware of John Walker creating
18 competition for us, or what we perceived to be
19 competition.

20 Q. And when did you become aware of that?

21 A. I believe it was sometime in September or
22 October of '04.

23 Q. Okay. What did you become aware of

84

1 specifically in September or October '04?

2 A. We -- somehow we became informed through one
3 of our vendors that Mr. Walker had negotiated
4 to purchase machines for a separate entity
5 when we thought he was out there working to
6 grow on behalf of us.

7 Q. And where were these machines purchased, or
8 where were they purchased to be put at?

9 A. Couldn't -- couldn't accurately identify that,
10 but it was done through one of our vendor
11 relationships. And I was told at the time
12 that it started as a negotiation on US
13 Beverage's behalf to obtain that pricing.

14 Q. And who was it that told you that?

15 A. Jim Marmion at Carpigiani.

16 Q. Did you discuss this with Mr. Walker?

17 A. Yes. And, in fact, I think it was stated in
18 the letter that we gave to him December 20th,
19 2004.

20 Q. And is that the initial buyout offer that US
21 Beverage sent to --

22 A. I believe it to have been.

23 Q. Okay. Just one second.

helped draw out the designs for the POS materials for Harvest Pure?

A. It is my testimony that we would bring a need to the table and we would be involved in our input as to what we thought we needed to create the image that we needed to successfully market the product.

Q. Okay. And what would your participation be -- how would that be different than any of the other companies buying Harvest Pure and selling Harvest Pure across the country?

A. Well, as a buying group, we all participated in that program. I mean, some had less purchases than we did, maybe, but all in all, it operated as a group, as a buying group.

Q. But you mentioned the person from Charleston, South Carolina --

A. Uh-huh.

Q. Is that Mr. Ragodo (phonetic); is that his name?

A. Ladery.

Q. Ladery. I'm sorry. And you said that it was actually Mr. Ladery that had the idea for the

98

name "Harvest Pure"?

A. Yeah. That was his creation.

Q. What about the point-of-sale materials, did Mr. Ladery act --

A. He spearheaded that. That was his -- that was his role in the buying group as the head of it.

Q. Okay. At any point was there a federal trademark issued or sought for Harvest Pure?

A. I could not answer that. I don't know if there was or was not.

Q. Okay. Do you know of any other efforts that were made to help push this brand, Harvest Pure, other than creating POS materials and so forth? Any advertising?

A. Oh, yeah. There was advertising and promotion and marketing towards these products, and even what we do as a company is a marketing effort to advertise and promote these products.

Q. Any joint advertising between the different members of the buying group?

A. I would need for you to specifically define advertising for me.

Q. Well, let's just break it down. Let's start with radio ads. Were any radio advertisements purchased?

A. Not a necessary function of our industry.

Q. Okay. Why -- just explain for us, why would radio advertising promoting Harvest Pure not be a necessary function of your industry?

A. Because in an institutionally-delivered product, at the time, we were driving the use of the product through our customers, meaning the restaurant, the bar, the bowling alley, wherever it may be. Most people were not so concerned about a brand identity in the public streets at that time. Radio is very costly. Difficult for small companies to afford radio or electronic media.

Q. Okay. Let me make sure I understand this. In essence are you saying that if I'm buying slush or juice concentrate at a bowling alley, as a consumer, you're not very -- at that point in time, you weren't concerned about whether me as a consumer knew about the Harvest Pure name or didn't? I just -- if I

100

was going to buy a slush at the bowling alley, I was going to buy a slush -- is that kind of what you were saying?

A. No. What I'm saying is in a captive audience situation, we could have called it one of a hundred things. It was the only slush available or soda available. The consumer was not as sensitive to that buying decision as would be believed. It's a captive audience. They can't -- there's not choices on that shelf for that genre. They got one. I can get the green one right there, end of story.

Q. Okay.

A. The branding does help identify what you call it, but lemonade is lemonade. Frozen, liquid, in powder form, it's lemonade, and the customer is going to request lemonade. They don't request Harvest Pure lemonade specifically, nor do you order Minute Maid orange juice; you order orange juice.

Q. Okay. Well, again, other than anything else you've already testified previously in terms of buying the product or participating at

whatever. The simple question is, during these discussions, was there ever a point in time where -- where there was a consensus or there were statements made by people in the meetings of the partners that by bringing John back to Montgomery and having here -- having him here onsite with US Beverage that the problems that we've talked about between the three partners would be made worse?

A. Not made worse but would still exist.

Q. Okay. Move on. Has US Beverage ever filed bankruptcy?

A. No.

Q. Has any of the owners of US Beverage ever filed bankruptcy?

A. I have not.

Q. What about any of the other owners of US Beverage?

A. Tom Clark, I believe, may have filed in 1988 or '89.

Q. Would he have filed individually or on behalf of the company?

A. I don't have that knowledge.

122

Q. Do you claim that Mr. Walker was using any of US Beverage's assets for the purpose of benefiting any other companies including Trident Marketing?

A. Yes.

MR. GILL: Object.

Q. Okay. How so? What company assets do you believe he was using to benefit -- let's start with Trident Marketing.

A. It would be my personal belief that the assets such as the cell phone, the gas card, utilizing expenses that would have been for the purpose of US Beverage's purposes, were utilized in doing that. I believe that our relationships with our vendors is proprietary to US Beverage and is an asset to US Beverage.

Q. And which vendors do you allege that Mr. Walker utilized?

A. Supreme Manufacturing and Carpigiani.

Q. And what do you obtain from Supreme Manufacturing?

A. Juice product, concentrates.

Q. Do you buy exclusively from Supreme?

A. Exclusively?

Q. In terms of juice products. I'm not talking about your other products.

A. No, not exclusively.

Q. Okay. What about the fruit juice that goes in the slush machines? Do you buy that exclusively from Supreme?

A. I would say currently they get the bulk of it. Is it exclusive --

Q. They don't get all of it?

A. There would be a couple of products because of our size -- we've had to spread our purchasing power to make sure that we don't outrun our supply chain.

Q. What about your Fruzers product? Does Supreme make your Fruzers product?

A. Yes.

Q. Make all of it?

A. Currently, yes.

Q. Okay. What do you obtain from Mr. -- from Carpigiani?

A. The Granita machines.

Q. Anything else from Carpigiani?

124

A. Just parts.

Q. Do you have any sort of exclusive relationship with Carpigiani?

A. We did at one time.

Q. Can you describe that?

A. We were a Carpigiani distributor.

Q. Did you have a sales territory?

A. Yes.

Q. What was that?

A. Related to specific pieces of equipment, we had Alabama, parts of Mississippi, and Georgia, I believe. As related to Granita, we were unencumbered.

Q. Were there any products that Carpigiani exclusively sold to US Beverage and couldn't sell to other companies?

A. Within a -- within a territory, yes.

Q. Okay. And what would those have been? Again, Granita machines?

A. No. That would have been related to the ice cream line. Equipment.

Q. Ice cream equipment?

A. Uh-huh.

1 A. No.
 2 Q. What about Jeff Bernstein? When did you have
 3 discussions with him?
 4 A. **I think we were actually engaged in business**
 5 **with him in some form or fashion probably two**
 6 **years ago.**
 7 Q. What city in North Carolina is Jeff Bernstein?
 8 A. **I'm not sure.**
 9 Q. Did you actually sell any product to Jeff
 10 Bernstein?
 11 A. **Currently, no.**
 12 Q. Well, in the past, have you sold any product?
 13 A. **I'd have to look at the records as to what the**
 14 **transactions were for, if it was related to**
 15 **supporting the Granita equipment that he was**
 16 **using or if it was products that he was using.**
 17 Q. Okay. But you think you might have had some
 18 dealings with him on equipment?
 19 A. **I believe we had some dealings with him, and**
 20 **I'm not -- I'm not certain. But we certainly**
 21 **called on these people to become customers.**
 22 Q. Was Jeff Bernstein a Cool Tropics'
 23 distributor?

134

1 A. **Yeah. I believe.**
 2 Q. You believe. Do you know if he still is a
 3 Cool Tropics' distributor?
 4 A. **I couldn't answer that.**
 5 Q. How about Books-A-Million in North Carolina;
 6 when did you make contact with them?
 7 A. **We had made contact with Books-A-Million prior**
 8 **to acquiring Tropical Perfections. And once**
 9 **we did acquire them, they came on as a**
 10 **customer of ours.**
 11 Q. Were you selling any products to
 12 Books-A-Million stores in North Carolina?
 13 A. **No. Equipment only. And probably more**
 14 **specifically parts.**
 15 Q. Do you sell products to any Books-A-Million
 16 store in terms of the product, not the
 17 equipment?
 18 A. **We've attempted on many occasions and have not**
 19 **been successful.**
 20 Q. Okay. Okay. And you mentioned another -- was
 21 it Tropical Perfections, the other --
 22 A. **Paradise, I believe.**
 23 Q. Paradise. Okay. Do you recall when you made

1 contact with that company?
 2 A. **Two to three years ago.**
 3 Q. Do you know who your contact person was with
 4 Tropical Paradise?
 5 A. **I cannot remember his name.**
 6 Q. Do you know what city Tropical Paradise is out
 7 of in North Carolina?
 8 A. **No.**
 9 Q. Do you recall if you sold any products to
 10 Tropical Paradise?
 11 A. **We sold products to them.**
 12 Q. What sort of products did you sell to them?
 13 A. **Juice concentrates.**
 14 Q. What about equipment; did you sell equipment
 15 to them?
 16 A. **That, I could not answer.**
 17 Q. What sort of business is Tropical Paradise?
 18 A. **He is a school slush and juice concentrate**
 19 **provider. And I hope I have the name right.**
 20 Q. Do they do anything else, convenience stores
 21 or any other --
 22 A. **I couldn't answer that, the full mix of their**
 23 **business.**

136

1 Q. Are you currently selling anything to Tropical
 2 Paradise?
 3 A. **They owe us money still.**
 4 Q. Is that why you stopped doing business with
 5 Tropical Paradise?
 6 A. **(Nods head.)**
 7 Q. Is that a yes?
 8 A. **Yes.**
 9 Q. She can't take down nods.
 10 A. **Sorry. Sorry.**
 11 Q. That's fine. Is Tropical Paradise in
 12 Virginia?
 13 A. **Yes.**
 14 Q. Are they actually based in Virginia not North
 15 Carolina?
 16 A. **Based in Virginia.**
 17 Q. Okay.

MR. WALKER: He already answered
 that question.

MR. JACKSON: Okay.

20 Okay. Let's change gears a little bit. Let
 21 me ask you about the decision that was made in
 22 2003 by the -- I guess, the owners of US
 23

Beverage to change the compensation arrangement for Mr. Walker. Do you recall that decision?

A. Yes, sir.

How -- first, tell me what -- what exactly happened? How was Mr. Walker's compensation with the company changed after that meeting?

A. His salary was increased.

Okay. What -- do you recall what his salary was before the October 2003 meeting?

A. I believe his salary was \$900 a week.

And what was it increased to?

A. 1300 a week plus commissions.

Was there any -- anything reduced that had previously been given to --

A. We had -- we had been compensating ourselves through a draw against profits. And what actually happened was John Walker's salary was increased and given commission to reach the \$102,000 a year, I believe, was the number that he could -- he could max that in commissions. And he still received any profits or distributions from the company.

138

That was not taken from him. It's just there was no profits or distributions to be gained at that time.

Okay. After the October 2003 meeting, how were you and Mr. Clark paid?

A. On salary.

And what was you and Mr. Clark's salary?

A. I believe I was 102,000, and I believe that Mr. Clark might have been 120.

And is it your testimony that Mr. Walker would max out at 102,000 a year?

A. In salary and commissions, he and I would emulate each other's.

Well, I guess you and Mr. Walker would emulate each other if Mr. Walker maxed out; is that correct -- in sales?

A. Correct.

What if Mr. Walker's sales weren't up to the level that you had set for him?

A. Well, per the agreement, we did the commission to incentivize (phonetic) him to participate in the company, because at the time, he had withdrawn quite a bit.

Q. Okay. Do you recall what the -- was there a sales goal made for Mr. Walker? How --

A. No. He was -- he was based on a commissionable rate that would have been easily obtainable to max out at the 102.

Q. Do you recall what level of sales he would have to obtain to max out at 102,000?

A. Without a calculator, I couldn't -- I couldn't do the math.

Q. And we talked before about the -- you know, distinction that your company or you were making between, you know, customers that may have Mr. Walker's name on the invoice, compared to customers you actually physically opened.

A. Correct.

Q. For what was Mr. Walker going to be compensated for in terms of these sales commissions? What would he have to do to turn a customer from -- to actually make money through having dealt with the customer?

A. He would have to make the initial contact, present the products, create the customer

140

profile sheet, basically, create the sales event. And then it was his job to maintain that relationship and maintain the ongoing account maintenance of that relationship for its entirety. It was not an open it and walk away from it. It was to maintain -- there was a residual income attached to that.

Q. Okay. And let's say if he lost a customer, would he lose the residual income?

A. No. There's no income there.

Q. No income at all?

A. For that customer. If they're not buying product, there's no commission.

Q. Okay. What about past commission? You lose that too?

A. If they didn't pay the bill, there's no commission owed.

Q. Okay. What if they did pay the bill?

A. Potentially, if he had maintained the account.

Q. I guess what -- I guess what I'm trying -- and, again, maybe we're misunderstanding each other -- let's say Mr. Walker opened an account in August --

1 **A. Uh-huh.**
 2 **Q.** -- the customer buys \$20,000 worth of slush or
 3 whatever, juice products, three months later
 4 decides to become another -- to associate with
 5 another slush company; \$20,000 worth of
 6 product that had been bought and paid for.
 7 Would Mr. Walker have retained a commission
 8 for that?
 9 **A. It would depend on if Mr. Walker maintained**
 10 **the account. There's more to it than just**
 11 **signing the initial customer profile. That**
 12 **means constant maintenance and contact with**
 13 **the customer; that means visitations to the**
 14 **company; that means solving service-related**
 15 **problems for the customer; that means taking**
 16 **orders from the customer when necessary, when**
 17 **they're short-falling; that means delivering**
 18 **that product to that customer during a**
 19 **shortfall, not alienating the customer.**
 20 **Q.** Who made the decision as to whether Mr. Walker
 21 had maintained the customer?
 22 **A. That would probably have fallen on the**
 23 **responsibility of Mr. Clark, because all**

142

1 **service negotiations and all delivery**
 2 **shortfalls come through him.**
 3 **Q.** Okay. Are you aware of any situations where
 4 there was product sold through Mr. Walker for
 5 which he's not been paid commission?
 6 **A. I would have to look at the records. I**
 7 **believe that Mr. Walker has been paid**
 8 **commissions for what he's owed.**
 9 **Q.** Okay. But were there instances where product
 10 was sold but there was a decision made that
 11 the customer had not been maintained?
 12 **A. Without records in front of me, I couldn't**
 13 **answer that accurately.**
 14 **Q.** You don't have any idea? I'm not asking
 15 you -- if you could just quantify it for us.
 16 **A. I could not.**
 17 **Q.** Did the -- the agreement that we have here
 18 before -- in Plaintiff's (sic) Exhibit 1 and
 19 2, did it provide that the partners of US
 20 Beverage, the three of y'all were supposed to
 21 be paid equally?
 22 **A. As well as equally manage the business.**
 23 **Q.** Okay. But it did provide that the partners

1 were supposed to be paid equally?
 2 **A. Provided there was --**
 3 **MR. GILL: Object to the form.**
 4 **A. -- equal participation.**
 5 **Q.** Well, we'll go through it. Let's find that
 6 portion of the contract.
 7 **MR. GILL: Are you talking about**
 8 **Page 11? Is that what you're**
 9 **talking about? If that's not**
 10 **what you're talking about, I**
 11 **apologize.**
 12 **Q.** Okay. Yeah. I believe what's Bates-stamped
 13 at the bottom US Beverage 011 and US Beverage
 14 012 on Plaintiff's (sic) Exhibit 1. Let's
 15 just -- if you don't mind for the record just
 16 read numbered Paragraph 5. Just read it
 17 aloud, if you don't mind.
 18 **A. Okay. (As read:) The stockholders should**
 19 **jointly manage the business.**
 20 **(Off-the-record discussion.)**
 21 **A. (As read:) Any increase in compensation shall**
 22 **require a two-thirds vote of the shares of**
 23 **outstanding stock in the corporation. Any**

144

1 **increase shall apply to all stockholders**
 2 **equally. Any decrease will require unanimous**
 3 **vote of all shareholders to the outstanding**
 4 **stock of the corporation.**
 5 **Q.** Okay. Did Mr. Walker consent to having --
 6 being changed to this sales commission
 7 arrangement we've just discussed?
 8 **A. Absolutely.**
 9 **Q.** He did?
 10 **A. Yes, he did.**
 11 **Q.** It's your testimony today that he agreed to
 12 that --
 13 **A. Absolutely.**
 14 **Q.** Do you have any paperwork or documents to show
 15 his agreement to that?
 16 **A. I will have to search. Probably not.**
 17 **Q.** Did Mr. Walker agree to allow you and Mr. --
 18 you and Mr. Clark to increase your salaries in
 19 October of 2003?
 20 **MR. GILL: Object to the form.**
 21 **A. Yes, he did.**
 22 **Q.** Is it your -- is it your belief that the
 23 arrangement you just testified to is

1 those during the break, lunch
2 break.

3 (The referred-to document was
4 marked for identification as
5 Defendants' Exhibit No. 3.)

6 Q. But -- and, again, Mr. Kittrell, is the
7 outline you were just discussing?

8 A. **This -- this was one of the outlines that**
9 **was -- that was utilized that day, I believe.**

10 Q. Are there any other outlines that...

11 A. **I don't recall.**

12 Q. Was this produced before or after the meeting?

13 A. **This was produced prior to the meeting. This**
14 **was a coverage of my recommended action plan,**
15 **is what this was.**

16 Q. Okay. Were there any notes or minutes
17 produced as a result of the meeting?

18 A. **There was probably notes taken by all three of**
19 **us on that day. It was a very lengthy**
20 **meeting, and what has happened to everyone's**
21 **notes on that, I couldn't tell you.**

22 Q. Are there any official notes or corporate
23 records taken?

154

1 A. **Again, I will have to say that Tom Clark**
2 **usually presided as the secretary and**
3 **treasurer of the meetings and usually took**
4 **notes. Where those have gotten to, I couldn't**
5 **attest.**

6 Q. Okay. Did John Walker agree to handle the
7 day-to-day affairs of Rio Grande?

8 A. **No.**

9 Q. Did he agree to go on the payroll of Rio
10 Grande?

11 A. **No.**

12 Q. Was there a decision made at that -- on that
13 meeting, that day, that Mr. Walker would not
14 return to the payroll of US Beverage?

15 A. **There was not a decision made that day, no,**
16 **other than his own.**

17 Q. Okay. And I may be misunderstanding what you
18 testified earlier. I thought you testified
19 that a decision was made that Mr. Walker
20 should go take over working for Rio Grande and
21 be paid out of Rio Grande. Did I
22 misunderstand you?

23 A. **That was -- that was a suggestion in my plan,**

1 **to eliminate his travel so that he could be**
2 **more effective.**

3 Q. Okay. And there wasn't any discussion at that
4 point of him going on Rio Grande's payroll and
5 dropping off of US Beverage's payroll?

6 A. **There was that discussion, yes.**

7 Q. Are you saying there wasn't a decision made
8 that day?

9 A. **I'm saying that John Walker told us at that**
10 **meeting that he would not participate, but he**
11 **would agree to not taking a salary, but he**
12 **would not work without getting compensated but**
13 **expected us to continue to maintain the**
14 **profitability of the company and work every**
15 **day while he did not participate.**

16 Q. Are those the exact words he used?

17 A. **I cannot say that.**

18 Q. Did he tell you he refused to participate in
19 US Beverage?

20 A. **He said, if I don't get paid, I don't work.**

21 Q. Is that a fair statement?

22 A. **No.**

23 Q. I mean, we talked yesterday about hats;

156

1 there's many hats that people wear,
2 corporate -- corporate officer, shareholder,
3 employee. Do you expect employees to work
4 without being paid?

5 A. **I expect a fiduciary to either answer to a**
6 **cash call or elect that he be diluted for a**
7 **cash call, resign as an officer so that we can**
8 **place someone in fact who would carry on that**
9 **fiduciary. But I do expect someone who has**
10 **made a capital investment in something, who is**
11 **an officer, shareholder, and employee, to work**
12 **at all means to save the investment.**

13 Q. Did Mr. Walker agree during this July 19th
14 meeting to permanently drop off the payroll of
15 US Beverage?

16 A. **I would have to say no, he didn't agree to**
17 **permanently drop off.**

18 Q. Was there any discussion of this decision to
19 stop paying the three members, or three
20 shareholders, of US Beverage as being -- any
21 discussion of a particular time limit,
22 60 days, 90 days?

23 A. **Yes, there was.**

1 replaced Mr. Walker? Could you have hired
2 someone else to fill his role in the company?

3 **A. I believe that's the current position that
4 we're in now.**

5 **Q.** But back in, let's say, 2002 or 2003 when he
6 moved to Texas, would it have been possible
7 for you to hire someone to fill the role of
8 sales -- being in charge of sales for your
9 company?

10 **A. You know, at that time, we had -- would it be
11 possible? I guess I don't understand the
12 question fully. And I'm not trying to be
13 evasive; I just don't understand --**

14 **Q.** And, again, we're talking about, you know --
15 we talked earlier about Mr. Walker having
16 various hats with the company.

17 **A. Correct.**

18 **Q.** And, you know, some hats are easier to remove
19 than other hats. But in terms of his --

20 MR. BILL: Object to the form.

21 **Q.** -- some of his -- in terms of his role as an
22 employee of the company, would it have been
23 possible, you know, in view of your

170

1 dissatisfaction with his role in the company
2 to have just fired him and replaced him with
3 a -- with another employee to fill his role?

4 MR. GILL: Object to the form.

5 **A. Would it have been possible? I mean, anything
6 is possible, I guess. The problem that I'm
7 going to say that we faced is we had set John
8 up to be the face of US Beverage, and we had
9 made those relationships that US Beverage had
10 that were proprietary to customers'
11 relationships that John interacted with on a
12 daily basis. We at times felt we were
13 probably unable to make good decisions based
14 on his lack of participation.**

15 **Q.** Well, let's go back to Trident Marketing. Did
16 US Beverage ever have any business
17 relationship with Trident Marketing?

18 **A. Yes.**

19 **Q.** Can you describe that relationship?

20 **A. When we became aware, again, my belief is that
21 we felt that John was creating a competitive
22 spirit against us, and if we were not willing
23 to cower to his demands and start paying what**

1 **I call extortion money to Trident Marketing,
2 then he would take our business infinitely
3 because he had those relationships. We feared
4 for the company once he made that maneuver.
5 And we did engage in business with Trident
6 Marketing for the betterment of the business
7 of US Beverage so that it didn't collapse.**

8 **Q.** And what business was that, again? What
9 business -- and I'm asking you what business
10 you engaged with Trident Marketing. I know
11 you just described why you engaged in
12 business, but let's say just specifically what
13 business did you engage with Trident
14 Marketing?

15 **A. Well, at the time, we had just had several
16 discussions about developing a brand
17 internally and its priority within our
18 organization. We felt that it did have a
19 priority, but it was not the primary focus of
20 what John Walker should be doing for our
21 company. It was one of the many
22 responsibilities that he had, along with
23 developing a Web site, developing POS,**

172

1 **developing these other things. But it was
2 still our intent that he needed to be selling
3 day to day, door to door to help us
4 financially move the company forward while we
5 had shifted the day-to-day responsibilities to
6 ourselves so that he could be freed to go out
7 there and interact with customers. And that
8 was his sole responsibility, sales and
9 marketing.**

10 **When he brought to us the
11 Trident Marketing issue, we were in a
12 situation where we were almost mortified. I
13 mean, we were paralyzed to know what to do.
14 So what we did was we did as he requested, we
15 engaged in business with him so that we
16 wouldn't lose the connection to him and
17 destroy our business.**

18 **Q.** Okay. And, again, I'm asking you just
19 describe for us the specific type of business
20 you did with Trident Marketing. What goods or
21 services or --

22 **A. John Walker, again, was to produce a brand for
23 us. That was part of his responsibility as a**

1 sales and marketing manager. He went off and
2 did that, we feel, with our resources and
3 created a brand that we feel is intellectual
property of ours and is an asset of US
Beverage, though it may be registered
6 somewhere else, and then came to us and
7 declared that if we did not pay him for the
8 use of that brand, he would take our business
9 from us and those relationships that he had
10 personal contact with and destroy us. So we
11 engaged in buying that brand from him.

12 Q. And, again, let me ask you -- you know, when
13 you said that he said he would -- are you
14 saying that's a direct quote from Mr. Walker,
15 that he would destroy US Beverage?

16 A. I've had several discussions with Mr. Walker
17 where he has described either I pay him what
18 he asks or he will seek to put us out of
19 business.

20 Q. On how many occasions has he said that?

21 A. I would say more than four to five.

22 Q. Has he ever said that in front of anybody
23 else?

174

1 A. Yes.

2 Q. Who?

3 A. Tom Clark, Buddy Todd.

4 Q. Who else?

5 A. I couldn't describe the other people that he
6 may have said that in front of. He may have
7 said that in front of his wife, possibly. I
8 don't know.

9 Q. Well, being a person that's residing in Texas
10 and you said he's not here in Alabama that
11 much, how could he destroy your company?

12 A. Well, because he has proprietary accounting
13 information to assist competitors in bids
14 against us. He knows our purchasing price
15 because he has our books. He has our customer
16 list, which is in our books. And he can
17 distribute that information to competitors so
18 that they can seek to harm us in a vendetta.

19 Q. Well, but you earlier talked about him being
20 set up to be the face of US Beverage to your
21 customers, but you also testified that he's
22 not here; he's in Texas.

23 A. That is true.

1 Q. How does he harm you as being the face of US
2 Beverage when you -- I think part of your
3 allegations is that he's not here?

4 A. Correct.

5 Q. He's not seeing your customers according to
6 you; correct?

7 A. To us, it's still amazing how active he could
8 get when he saw personal gain only and not the
9 gain for the corporation. He became very
10 active in trying to hurt the company. But,
11 again, to have those books, that proprietary
12 knowledge, to have our vendor contacts and our
13 vendor pricing to pass to other competitors so
14 that they may buy at the same price we had
15 already negotiated and worked many years to
16 obtain, that's very damaging to us.

17 Q. Let's talk about the creation of a brand.

18 When do you first recall -- and you and John
19 Walker -- talking about US Beverage creating
20 its own brand for slush products?

21 A. I would say that the discussion probably arose
22 the minute that he came onboard with us.

23 Q. Who brought up that discussion?

176

1 A. Well, that discussion had been going on
2 between Tom Clark and myself for a long time
3 about developing a blanketed brand for all of
4 our products. This was not a new discussion
5 to US Beverage.

6 Q. Did John Walker ever approach you and ask
7 you -- or ask you and Mr. Clark to invest
8 resources toward creating an in-house brand?

9 A. We felt he asked us to invest excessive
10 resources.

11 Q. What did he ask you specifically? Did he ask
12 for a particular amount of money toward that?

13 A. Again, part of it was in the Ryan Hamner
14 discussions, he was bringing friends or
15 associates of his, not shopping the best price
16 for us, we felt. And all we asked for was,
17 please, get us several quotes on these type of
18 things. We actually set up a marketing
19 company to meet with Mr. Walker to assist him
20 in this project, which Mr. Walker just
21 wouldn't even engage in the conversations, was
22 not eager to engage this other company to help
23 us in the development of that brand, which was

one that we had all gone and met with. We had agreed to allocate some resources but not millions of dollars. We just didn't think that was a necessary function. We just didn't think that the brand development was going to cost that much. The value of the brand is based on the marketing and distribution of the brand.

Q. Is it your testimony today that John Walker asked the company to invest millions of dollars toward the creation of a brand?

A. No. I said we did not feel that we needed to.

Q. Okay. Well, I'm asking you what your recollection is of what Mr. Walker asked in terms of financial resources from US Beverage to help to create a brand.

A. I would say that the initial discussions were in excess of \$5,000.

Q. And you thought a \$5,000 investment in a new brand was excessive?

A. I thought that the way that he wanted to allocate the funds could be perceived to be excessive. I thought we could have come up

178

with several names to start exploring development of, as opposed to paying a Ryan Hamner or someone 5,000 just for a logo.

Q. And is that your testimony, that he proposed to just spend \$5,000 paying Ryan Hamner, and that was the only thing he proposed to you in terms of --

MR. GILL: Object to the form.

A. No. That would not be. I've misstated that.

Q. Okay. Well, and I misunderstood you, so you can clarify that.

A. We did not feel that the amount of money was necessarily the issue. We felt that the amount of focus that John Walker wanted to designate to that project was a little -- we still felt he needed to be selling day to day and working on that project in his spare time, not that that became the focus; that those resources were better used day to day making sure that our accounts were taken care of; that the cash flow of the business was secure so that we could pay our bills and continue to grow and then develop a brand through that.

Q. Okay. Just to make sure I understand, I guess at some point there was a decision made that US Beverage, first, doesn't want to spend the money that Mr. Walker had proposed, or however he had budgeted the money; and, secondly, that the other members of the company wanted Mr. Walker to spend his time on developing customers rather than developing a new brand; is that --

MR. GILL: Object to the form.

A. No, that's not accurate.

Q. Okay. Well --

A. We feel that the majority of his time should have been spent on the day-to-day business that US Beverage was engaged in. But that the marketing is a very essential part of what we do. We are nothing more than a marketing company. That is what we do. We take a product; we go to the streets and we market and we sell; and then we distribute. It's all a function of marketing. We felt that a brand was important to us, but at the time when you cannot pay your bills, the most important

180

thing -- not to lessen the importance of a brand -- but the most important thing was to continue the path that we had all signed off on and to develop the brand as an addition to the marketing plan, not that the sole function of John Walker came to be a brand-development manager. That was not the direction we wanted to go.

Q. When did you first hear the name Juice Alive?

A. I would say the first recollection I have of Juice Alive as a name would have been at the time -- I could not give you a definite date on that.

Q. Did you come up with the name Juice Alive?

A. No.

Q. What about Mr. Clark; do you think he -- are you contending he came up with the name Juice Alive?

A. I do not think he did.

Q. Well, do you think the first time you heard about the name Juice Alive would have been from John Walker?

A. Yes, I believe that.

1 intention -- at least the documents produced
2 by -- or created by US Beverage or you, the
3 intention of which was to create an exclusive
distributorship everywhere?

4 **A. That was our intention, was to be the sole**
5 **distributor for that product. We felt it was**
6 **our product brand.**

7 **Q. In the entire US?**

8 **A. In the entire US that we could set up**
9 **sub-distributors through us and things like**
10 **that for other means of distribution, but that**
11 **it would all flow through US Beverage. The**
12 **references were to direct distribution, that**
13 **we would handle directly, not as a support**
14 **agent coming through us. We never intended to**
15 **give our company away. That was not the**
16 **intention of our documents.**

17 **Q. I guess as we said before, the documents will**
18 **speak for themselves. But let's go to the**
19 **next document, then. Mark this Defendants'**
20 **Exhibit No. 16 and ask you if you can identify**
21 **it. Have you seen this document before?**

22 (The referred-to document was
23

230

1 marked for identification as
2 Defendants' Exhibit No. 16.)

3 **A. Yes, I have.**

4 **Q. Can you identify it for the record?**

5 **A. It is a correspondence between Gary Dukes and**
6 **Tom Clark.**

7 **Q. Does that appear to be Tom Clark's signature**
8 **at the bottom?**

9 **A. Yes, it does.**

10 **Q. Do you have any reason to believe that this**
11 **did not come from Tom Clark?**

12 **A. No, I do not.**

13 **Q. If you'll read the first line -- just read the**
14 **first sentence of the -- underneath "Gary."**
15 **Read it aloud for the record.**

16 **A. You need me to read it out loud?**

17 **Q. Yes, sir.**

18 **A. Okay. (As read:) We have reached an agreement**
19 **with Juice Alive to start distribution of the**
20 **Juice Alive brand in our 100 percent juice**
21 **products.**

22 **Q. Just keep reading. Read the second sentence,**
23 **too.**

1 **A. (As read:) Please let this signed fax serve as**
2 **official authorization for you to begin**
3 **selling to US Beverage, Inc., the Juice Alive**
4 **product with \$1.20 increase per case to be**
5 **paid to Juice Alive.**

6 **Q. Okay. And this document is US Beverage**
7 **agreeing to pay Juice Alive for the right to**
8 **distribute the Juice Alive product?**

9 **A. This document is authorizing that, under**
10 **duress, US Beverage, for fear of losing**
11 **accounts based on proprietary information, we**
12 **were willing to engage in a contract that we**
13 **were being coerced into to protect the**
14 **business at hand, which was the distribution**
15 **of 100 percent juice products through the**
16 **vehicle US Beverage.**

17 **Q. Let me ask you, you mentioned the word of**
18 **"duress." There's different forms of duress.**
19 **And your attorney can -- I'm sure has told you**
20 **that. Are we talking about physical duress?**

21 **A. I'm talking physical, emotional, financial.**

22 **Q. Well, I'm just asking about physical. What**
23 **sort of physical duress were you or Tom Clark**

232

1 under when you signed this document?

2 **A. The financial pressures revolving around which**
3 **causes --**

4 **Q. And let's --**

5 **A. That's physical duress to me. I can't sleep;**
6 **I can't eat; I'm sick all the time. I have**
7 **physical duress over the financial stability**
8 **of my company.**

9 **Q. Okay. At any point did Mr. Walker threaten**
10 **violence against you or your person if you**
11 **didn't sign this agreement?**

12 **A. On several occasions Mr. Walker has threatened**
13 **violence by threatening that he was an ex-navy**
14 **SEAL, and he could kill us at will. Not this**
15 **document, but we have been threatened on many**
16 **occasions.**

17 **Q. Okay. Now, let me make sure I understand.**
18 **Are you testifying today that Mr. Clark signed**
19 **this document on behalf of US Beverage because**
20 **he had been threatened physically?**

21 MR. GILL: Object to the form.

22 **A. I believe that any human who has been**
23 **threatened with physical violence will always**

Beverage heard Scotty West make that comment?

A. I couldn't answer yes or no to that.

Q. I'm going to ask you about this. But if you'll look at the next document we're going to mark Exhibit 26, Defendants' Exhibit 26.

(The referred-to document was

marked for identification as

Defendants' Exhibit No. 26.)

Q. Okay. And there was some discussions yesterday during the deposition of my client, Mr. Walker, about this document, his amended tax return.

A. Correct.

Q. Are you familiar with this document?

A. Very.

Q. Okay. What can you tell us about this?

A. This was a tax document that was presented to me sometime June or later of '02 when I was preparing some documents for some loans, an SBA loan, I believe, and some other various loans from banks. But John had alerted me to the fact that he had amended the corporate return. And at that time, we had a very

314

specific meeting with Mr. Walker about the fact that we now own Tropical Perfections and he had no right or entitlement to go back and change his tax return after we had purchased the assets of the corporation. And, in fact, what he did was he said, well, it reduced my tax liability and I got a bigger refund after I filed the amended return. And we discussed with him then, but you passed a tax liability on to US Beverage by doing so. We already owned the company. He had no right to go back and change this. He no longer owned this tax return. This was an asset and property and financial document of US Beverage.

Q. Do you allege there's any sort of specific loss to US Beverage as a result of this?

A. Absolutely. He passed on a tax liability.

Q. How much?

A. I'm going to say it may have been close to -- and without the other document in front of me, it was probably 12 to \$15,000 or greater.

Q. And what's the date of this document? Yeah.

A. It's toward the bottom of the page. See the

line that says preparer's signature?

A. 6/20/02.

Q. Would you have received this document sometime around 6/20/02?

A. I do not know when I specifically received the document, but I said it was sometime after June.

Q. Okay. How soon after June?

A. I could not make a statement.

Q. Within days or weeks?

A. Again, it was -- I was working on getting documents together for loan preparation, and John had alerted me to this. He may have given it to me the 20th.

Q. Did you demand that John withdraw the amendment?

A. We sat down with John. And, again, as many discussions with John are, they become very circular. John will do what John wants to do, not necessarily what he's asked to do by the corporation or any of those. We sat down. It had been filed. You know, at the time, again, we worked very hard, very hard at trying to be

316

very amicable to John in many situations, knowing that he had come into a different organization, trying to make him comfortable. And at the time, we said, look -- and I cannot remember what the resolution was. We said, you've done it; it's over; we counseled him and asked him not to continue this type of behavior; and that we would move forward with the relationship of US Beverage, and we would try to keep doing business and move forward, and this would be the new tax return that we represented as the official closing tax document of Tropical Perfections from that date forward, and it is the one that I have used since then.

Q. Okay. And I'm sorry. It's been a long day, but is that a no, because I asked you whether or not you asked Mr. Walker to withdraw this amendment?

A. I would say no.

Q. Are there any claims in the current lawsuit relating to this amendment? Are you making any claims for repayment of money to US